No. 86-919

In the Supreme Court of the United States

OCTOBER TERM, 1986

LIMPERT BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

14 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unlawful conduct, including the discharge of 15 employees because of their union support, precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-919

LIMPERT BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A5-A7) is reported at 800 F.2d 1135 (Table) and the denial of rehearing (Pet. App. A1-A4) at 800 F.2d 333. The decision and order of the National Labor Relations Board (Pet. App. A8-A16), including the decision of the administrative law judge (Pet. App. A17-A130), are reported at 276 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1986. Petitioner's timely petition for rehearing was denied on September 5, 1986. The petition for a writ of certiorari was filed on December 4, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1982, Local 56, United Food and Commercial Workers International Union (the Union) began an organizational campaign at petitioner's plant (Pet. App. A17). On June 16, eight of petitioner's 32 production employees signed union authorization cards at a union organizational meeting. Pet. App. A24-A25.[1] Eleven more employees signed cards the following day. Pet. App. A25.[2]

During the morning of June 17, an employee who had declined to sign an authorization card told petitioner's managers, Giordano and Mangine, about the union organizing campaign. Pet. App. A54. Later that day, petitioner called an employee meeting at which Giordano announced that because of declining sales the work week would be cut to four or possibly three days, but that petitioner would try to avoid any layoffs. Giordano added that the employees and management were like a "family" and that she knew it would be difficult for them to find jobs, so there would be no layoffs. This was the first time that the employees heard any mention of cutbacks or layoffs due to petitioner's financial problems. Pet. App. A55.

On June 18, President Limpert and Managers Giordano and Mangine held another employee meeting. Limpert announced that petitioner was faced with financial problems due to a lack of sales and the general state of the

---

[1]The list of employees who signed cards on June 16 is misprinted in petitioner's appendix, omitting one employee—John Mazzi—included in the administrative law judge's published decision. See 276 N.L.R.B. No. 37, J.D. 4 (Sept. 24, 1985).

[2]The administrative law judge lists only ten employees as having signed cards on the 17th. Pet. App. A25. Based on the subsequent discussion (Pet. App. A31-A32), however, it is clear that one additional employee—Miquel Velez—also signed on that day. Velez's card is included in the total of 19 cards found to be valid by the administrative law judge. Pet. App. A53.

economy and consequently would have to lay off some employees. Giordano and Mangine distributed layoff notices and final paychecks to ten employees, all of whom had signed union authorization cards. Pet. App. A68. Two additional employees who had signed cards were permanently laid off later in the day. Employees who asked Limpert or Giordano whether they were being laid off or discharged were told they were being discharged. Pet. App. A56-A59, A68.

The next day, President Limpert told one of his remaining employees that he would close his doors before allowing a union in. Pet. App. A60-A61. On the same day, Plant Manager Mangine told two employees that the employees had been laid off because "management knew of the union activity." Mangine also remarked that work was accumulating and petitioner was short of production workers. Pet. App. A61-A62.

On Monday, June 21, petitioner received a letter from the Union requesting recognition and stating that a majority of employees had designated the Union as their collective bargaining representative. On June 22, petitioner denied the Union's request. Pet. App. A63-A64.

Slightly more than one week after the mass discharge, petitioner began rebuilding its work force with new hires. By August 4, its work force had increased to 31; by August 9, it stood at 38. Although in early September the work force declined to 30, it increased again in mid-September and between September 14 and September 30 it exceeded all pre-layoff levels. The size of the unit decreased again in November when petitioner experienced its usual seasonal decline in business. Pet. App. A64-A65, A81.

On September 20, the Union established a picket line at petitioner's plant to protest the June 18 mass discharge. Some of the discharged employees joined the picket line.

Pet. App. A94. Three of petitioner's employees refused to cross the picket line and were discharged. Pet. App. A94-A97. Subsequently, President Limpert told one of the discharged employees when he came to the plant to pick up his paycheck that the Union had tried to organize his plant before but he had "defeated them then and he would defeat them [again]." He said "that they never will get into his plant because he would move out of town or close it up." Pet. App. A97, A99-A100.

2. The National Labor Relations Board, adopting the findings and conclusions of an administrative law judge, held that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by interrogating employees about their union activities, by threatening to close the plant if it became unionized, and by announcing a cutback to a three- or four-day work week. Pet. App. A9 n.1, A66, A67-A68, A84-A85, A103. The Board also found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging 12 employees shortly after they signed union authorization cards and by discharging three employees because they refused to cross a lawful picket line established to protest the initial 12 discharges. Pet. App. A9 n.2, A112. In finding the discharges of the 12 employees to be unlawful, the Board rejected petitioner's contention that the discharges were motivated by economic considerations and not by anti-union animus. Pet. App. A76-A85. Finally, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the Union since June 21, when the Union demanded recognition on the basis of authorization cards signed by a majority of the employees in an appropriate unit, while at the same time engaging in pervasive unfair labor practices that undermined the Union's majority status and made a fair election impossible. Pet. App. A113-A114.

The Board ordered petitioner, *inter alia*, to offer the 15 employees discharged on June 18 and September 27 immediate and full reinstatement to their former jobs; to make them whole for any loss of pay or other benefits they might have suffered as a result of its discrimination against them; and to recognize and bargain, upon request, with the Union. Pet. App. A119-A120. In finding a bargaining order necessary to remedy petitioner's unfair labor practices, the Board pointed to petitioner's "substantial and pervasive unfair labor practices"—especially the mass layoffs of employees who had signed authorization cards and the subsequent discharge of employees who refused to cross the picket line—and concluded that these actions had dissipated the Union's majority and precluded a free election. Pet. App. A115-A117.

3. The court of appeals, without opinion, upheld the Board's decision and enforced its order. Pet. App. A5-A7.

ARGUMENT

Petitioner does not challenge the Board's finding, upheld by the court of appeals, that it reacted to the Union's organizing efforts by an unlawful campaign encompassing threats, interrogations and a mass discharge of union supporters.[3] Rather, petitioner contends that, despite petitioner's unfair labor practices, the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 8. But the court's decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is unwarranted.

---

[3]Petitioner does assert in its statement (Pet. 4) that the discharges were motivated by economic considerations. This claim, however, was explicitly rejected by the Board (see Pet. App. A76-A85), and the petition does not contest the propriety of that finding.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may order an employer to bargain with a union when the employer has committed unfair labor practices that "tend to preclude the holding of a fair election." 395 U.S. at 594. The Court stated that the Board may order an employer to bargain with a union not selected in a Board election both in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices (395 U.S. at 613-614), and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (*id.* at 614). In such cases, the Court recognized, authorization "cards may be the most effective—perhaps the only—way of assuring employee choice." *Id.* at 602. The Court added that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' " (*id.* at 610, quoting *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with a union that has not been certified in a Board election whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

In the instant case, 19 employees, a clear majority of the 32-member bargaining unit, signed cards appointing the union as their authorized representative. Petitioner's immediate response was to fire 12 of those employees. In light of the specific finding adopted by the Board that the purpose of the firings was to eliminate the pro-union majority and frustrate the efforts of employees to unionize the plant (Pet.

App. A84; A115-A117), this was a paradigm case for the issuance of a bargaining order. Petitioner's actions were both outrageous and pervasive, satisfying even the stricter of the two standards set out in *Gissel* and fully justifying the Board's conclusion that petitioner's unfair labor practices prevented a free election and caused the dissipation of the Union's majority, thereby warranting the issuance of a bargaining order based on the cards (Pet. App. A116).

2. Petitioner does not contend that the unfair labor practices committed by it were not pervasive and serious within the meaning of *Gissel*. Instead, petitioner claims (Pet. 8-10) that the Board improperly failed to consider such countervailing factors as the passage of time, employee turnover, and the lack of further unfair labor practices, all of which indicate that a fair election could be held despite petitioner's actions. There is no merit to that contention. None of the factors cited by petitioner undermines the Board's conclusion that traditional remedies would not suffice to ensure a fair election, much less demonstrates that the issuance of the bargaining order was "patently improper and unfair" (Pet. 9-10).

Mere passage of time does not obviate the need for a bargaining order; to hold otherwise "would in effect be rewarding the employer" by permitting him "to delay or disrupt the election processes and put off indefinitely his obligation to bargain." *Gissel*, 395 U.S. at 610-611. See *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 265 (3d Cir. 1982) (en banc).

Nor can petitioner rely on the effects of high turnover since it unlawfully fired the employees in question. The lower courts have uniformly held that turnover caused by the employer is not a basis for holding that a fair and reliable election can be conducted. See, *e.g.*, *NLRB* v.

Gordon, 792 F.2d 29, 34 (2d Cir. 1986), cert. denied, No. 86-392 (Nov. 3, 1986); *NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100-101 (2d Cir. 1985); *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 264-265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981).

Finally, contrary to petitioner's contention (Pet. 9 & n.1), its unfair labor practices did not cease with the mass discharge. Three months later, when three employees refused to cross a valid picket line established to protest the initial discharges, petitioner fired them as well and reiterated its vow to close down rather than to operate with a union. Petitioner's reliance (*ibid.*) on the picket line to establish that employees were no longer intimidated by its unlawful conduct is incredible; the only employees who joined the line were those already discharged who had nothing to lose, and the three employees who honored the line were promptly fired—further driving home the message to the remaining work force that union support would mean job loss.[4]

The decision of the administrative law judge adopted by the Board developed at length the factual circumstances of this case (Pet. App. A19-A115) and clearly articulated ample grounds for concluding that a fair and reliable election could not be conducted (Pet. App. A115-A117). No further discussion of the inapposite factors cited by respondent was required. *NLRB* v. *Keystone Pretzel Bakery, Inc.*, 696 F.2d at 265; *Justak Bros. & Co.* v. *NLRB*, 664 F.2d at 1081-1082.

---

[4]The fact that petitioner had not resorted to such measures in two earlier organizational campaigns (see Pet. 9) provides no assurance to the employees that it would not again retaliate against union supporters where, as here, the employees appeared to have successfully mounted a union campaign.

3. To the extent that the petition can be read as arguing that the Court should modify *Gissel* by articulating more specific limitations on the Board's discretion to issue a bargaining order (see, *e.g.*, Pet. 6-8), this case is a wholly inappropriate vehicle for such fine tuning because of the egregious nature of petitioner's conduct. Under any plausible standard that permitted the issuance of a bargaining order, this case would qualify. More fundamentally, any such rigid calculus would preclude the flexible reliance upon experience that this Court has recognized is essential to the Board's determination of when a bargaining order is appropriate. *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 612 n.32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

JANUARY 1987